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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 125

DOMINION NATIONAL BANK of Bristol, Virginia, Trustee, and PAULINE M. DuFRESNE, Trustee, *Petitioners*,

v.

JOE F. HALE, Individually and as Former Collector of Internal Revenue for the District of Tennessee, *Respondent*.

DOMINION NATIONAL BANK of Bristol, Virginia, Trustee, and PAULINE M. DuFRESNE, Trustee, *Petitioners*,

v.

LIFE HENSLEE, Individually and as Collector of Internal Revenue for the District of Tennessee, *Respondent*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

ROBERT ASH,
JOHN W. CRAGUN,
Munsey Building
Washington 4, D. C.
Counsel for Petitioners.

S. BRUCE JONES,
WM. H. WOODWARD,
WALDO G. MILES,
Bristol, Virginia
Of Counsel.

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No.

DOMINION NATIONAL BANK of Bristol, Virginia, Trustee, and PAULINE M. DEFRIECE, Trustee, *Petitioners,*

v.

JOE F. HALE, Individually and as Former Collector of Internal Revenue for the District of Tennessee, *Respondent.*

DOMINION NATIONAL BANK of Bristol, Virginia, Trustee, and PAULINE M. DEFRIECE, Trustee, *Petitioners,*

v.

LIPE HENSLEE, Individually and as Collector of Internal Revenue for the District of Tennessee, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners, Dominion National Bank of Bristol, Virginia, Trustee, and Pauline M. DeFriece, Trustee, by their attorneys, respectfully petition the Court to grant a writ of certiorari to review the decrees of the United States Court of Appeals for the Sixth Circuit filed January 18, 1951 (R. 43), on which a petition for rehearing was denied March 20, 1951 (R. 64).

OPINIONS BELOW.

The oral opinion of the District Court rendered at the conclusion of the hearing appears at R. 27-30, and is unreported. The findings of fact and conclusions of the District Court appear at R. 31-36.

The opinion of the United States Court of Appeals for the Sixth Circuit is reported in 186 F. 2d 374, and appears in the record at R. 44-49. Its memorandum and order upon the petition for rehearing is unreported, but appears in the record at R. 64.

JURISDICTION.

The jurisdiction of this Court is invoked pursuant to the provisions of § 1254(1) of the Judicial Code. The petition for rehearing having been denied March 20, 1951 (R. 64), time within which this petition may be filed extends to June 18, 1951.

QUESTION PRESENTED.

The income of a single primary trust was distributed upon receipt by petitioners, as required by the trust indenture, among the four subsidiary trusts for the grantors' respective grandchildren. The income was retained in the subsidiary individual trusts to accumulate for the benefit of the four grandchildren.

The question for decision is:

(1) Are the petitioners, as trustees, required to pay an income tax on the basis of four separate trusts, or

(2) Are the petitioners, as trustees, required to pay an income tax on the basis of a single trust?[1]

---

[1] A trust is taxable as an individual where the income is retained and not distributed. Consequently, if the income here involved is taxed to the one primary trust, the rates will be somewhat higher than if taxed to the four separate trusts to which the income was distributed.

STATUTES INVOLVED.

The Internal Revenue Code provides (26 U.S.C.):

"§ 161. *Imposition of tax*

(a) *Application of tax.* The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

(1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;

(2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an infant which is to be held or distributed as the court may direct;

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate; and

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and payment.* The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor).

* * *

"§ 162. *Net Income*

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * *

(b) [As amended by Sec. 111(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798].[1] There shall be allowed

[1] Prior to 1942, Section 162(b) contained slightly different provisions but none of those are material here.

as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, 'income which is to be distributed currently' includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

* * * * ".

STATEMENT.

In 1941, Ina J. Massengill entered into a trust agreement with petitioners as trustees whereby there was conveyed to petitioners an undivided one-half interest in certain chemical formulae owned by the granter and in use by a corporation under a royalty agreement. Petitioners as trustees were to own, hold, manage and lease the formulae for the equal benefit of the grantor's four grandchildren. Paragraph 2 of the trust deed provides for subsidiary trusts as follows (R. 20):

"2. All **income** received from the properties **shall**, upon receipt, **be divided into equal parts, one for each of the grandchildren, and placed to the separate credit of each such grandchild.** The income so received and credited to each above named grandchild shall be invested and reinvested by the Trustees and all accruals to **each** share, less necessary and proper charges, shall be held by the Trustees and allowed to accumulate in **each grandchild's account** until such grandchild shall have attained the age of 21 years. When such age is attained by **any** above named grand-

child, such grandchild shall be entitled to receive, and the Trustees shall pay in quarterly payments, all income from the investments made by funds so coming in and **held on behalf of such grandchild** and shall continue such payments of income from such investments to such grandchild until he or she reaches the age of 30 years. When such grandchild reaches the age of 30 years he or she shall be entitled to receive and the Trustees shall pay to such grandchild (in addition to the income from investments) **such grandchild's proportionate part of the income from the formulae as may come in after such 30th birthday**, the Trustees at the same time retaining control and title to **the invested corpus of such grandchild** and to the formulae. On December 31, 1960 this trust shall automatically terminate and the Trustees shall pay or transfer and deliver to **each** of the grandchildren then living all the corpus investments held by them to the credit of **each** such grandchild and shall also transfer to such grandchild his or her undivided fractional part of all the formulae herein conveyed; * * * "

It appears from the foregoing quotation that the income of the primary trust was required to be divided, upon receipt, and distributed in equal parts to each of the subsidiary trusts. It then became the corpus of each of the four subsidiary trusts for the benefit of the four grandchildren. But it was not to be paid out of those trusts (save in an emergency, Paragraph 4, R. 21-22), but was to be accumulated until the particular beneficiary reaches the age of 30, after which time and until the trust terminates only half of the income distributable on behalf of the particular grandchild was to be accumulated in his subsidiary trust, the other half being paid directly to the grandchild.

During the years 1941-2-3, the trustees received income from the formulae (which constituted the corpus of the primary trust) and allocated this income amongst the four grandchildren in the separate accounts maintained on behalf of each. (R. 18, ¶ 4.) However, in filing fiduciary income tax returns, the entire income of the primary trust was treated as though it had been retained therein and as

if it were taxable to that trust without deduction for the distribution which had actually been made. Claims for refund were filed on the theory that, as required by the trust indenture and as practiced by petitioners in fact, the income had been divided and distributed to the individual subsidiary trusts in which it had been retained and to which it was taxable. (R. 18-19, 26-27.) The claims were disallowed by the Commissioner of Internal Revenue, and this action was instituted in the United States District Court for the Middle District of Tennessee to recover the refunds.

The District Court held (Opinion, R. 27-30) that neither the references to "this trust" in the trust agreement nor yet the fact that returns were filed as if the proceeds had been held in the primary trust was binding upon the court. Paragraphs 2 and 3 were considered controlling and as expressing the intention of the grantor to make the income of the primary trust, when divided, the separate and distinct property of each grandchild and to reinvest it for his separate account, and in the event of his death before termination of the trust, to have it devolve upon his descendants. The court held itself bound by an earlier decision of the court below, *MacManus* v. *Commissioner Int. Rev.* (C.A. 6th, 1942), 131 F. 2d 670, since,

> "that property [when distributed to the subsidiary trusts] is just as much the sole and separate property of each grandchild as it would have been if a separate instrument had been executed as to each one of these trusts, and if the grantor had in the beginning made four separate conveyances of an undivided one-fourth interest in that part of the formulas that were conveyed to the Trustee." (R. 29.)

Both in his opinion (R. 30) and in the conclusions of law (R. 36), the District Court pointed out that under the trust agreement the formulae conveyed in trust to petitioners constituted one separate trust, but that four separate and distinct trusts were created with respect to the income re-

ceived by petitioners from the formulae, which became the separate property of each of the beneficiaries to whose individual trusts it was taxable.

In reversing, the Court of Appeals (R. 44-49) considered that while subsection 2 might be persuasive of the soundness of the District Court's conclusion that multiple trusts were created were it standing alone, still all other references in the agreement are to the trust in the singular; and since, so far as the credits to the individual beneficiaries are concerned, the original corpus or its income might go to some contingent remainderman were the individual beneficiary to die prior to termination of the trust, the provisions for devolution in the event of the death of an original beneficiary constitute "merely a direction to the trustees as to the manner of keeping the accounts of the trust and [are] not indicative of an intention to create multiple trusts" (R. 49).

REASONS FOR GRANTING THE WRIT.

The District Court plainly expressed its opinion that the trust indenture in this case established not only a principal trust but also four subsidiary trusts, the corpus of each of which was formed out of the distributable share of income from the corpus of the principal trust. The District Court states (R. 27) that

> "the intention of the grantor is fully expressed in Paragraphs 2 and 3 of the document";

and that (R. 30)

> "the intention of the grantor in executing this trust document, or trust agreement, was to make four separate and distinct trusts as far as the income from the formulas was concerned."

It was held in the Court of Appeals below that the question whether there was more than one trust depends upon the intention of the donor as derived from the terms of the trust instrument. (R. 46.) If this be a question of fact, the

judgment of reversal below was improperly reached; for there has been no suggestion that the trial court acted without substantial evidence to support its conclusion (*cf. State Farm Ins. Co.* v. *Coughran,* 303 U. S. 485, 487), and in no respect, therefore, was its determination "clearly erroneous" under Rule 52 of the Federal Rules of Civil Procedure.

But the court below treated the question of interpretation of the instrument as a matter of law. In doing so it reached a result in direct conflict with the decision of the United States Court of Appeals for the Fourth Circuit in *Lynchburg Tr. & Savgs. Bank* v. *Commissioner Int. Rev.* (C.A. 4th, 1934), 68 F. 2d 356, cert. den. 292 U. S. 640. There follows a parallel statement of the facts and holdings in the two cases:

This Case	*Lynchburg Trust Case*
Primary trust estate established in one-half of certain property by indenture; income from it to be divided among four grandchildren beneficiaries, and to be retained and invested for their benefit.	Primary trust estate established in certain property by will, one-half the income from which was to be divided between two grandchildren beneficiaries with power to retain and invest it for their benefit.
Separate accounts maintained of the share of each beneficiary in the retained and invested income from the principal trust.	Separate accounts maintained of the share of each beneficiary in the retained and invested income from the principal trust.
Question whether trustees taxable on retained income as if held in the primary trust, or on the separate trusts as held for each individual grandchild.	Question whether trustees taxable on retained income as if held in the primary trust, or on the separate trusts as held for each individual grandchild.

This Case	*Lynchburg Trust Case*
Corpus and accumulated income in individual subsidiary trusts payable to the grandchildren at age 30, or if not living, then to their descendants or parent as remaindermen.	Corpus (accumulated income) in individual subsidiary trusts payable to the grandchildren at age 30, and considered meanwhile to have been held for their individual benefit.
Held, entire income of the principal trust, even though distributed to and held in the individual trusts, taxable to the principal trust as a single entity.	*Held,* income of the principal trust distributed to and held in the individual trusts taxable to the individual trusts as separate entities.

In its order denying the petition for rehearing in this case, the court below (R. 64) did not view the *Lynchburg Trust* case as in conflict with its own decision. It stated that in the *Lynchburg* case the will creating the trust empowered the trustees to invest income in the improvement of the property of the beneficiaries,[2] whereas here the only available funds of the trust were the proceeds of the primary trust and were referred to not as property of the beneficiaries, but as the invested corpus of the estate. The court below stated,

> "This distinction we considered vital in determining the intention of the grantor".

---

[2] As shown by 68 F. 2d at p. 358, the provision for retention and investment of the income of the primary trust estate provided not merely for improvement of the property of the grandchildren but authorized investments on the same terms as the principal trust itself. That provision in full as quoted by the Court of Appeals for the Fourth Circuit is as follows:

> "I authorize my executors, or the survivors of them, or the one qualifying, to hold back and invest from the income of my two grandchildren, or either of them, such portion of said income as they may think advantageous, such investments to be made as hereinbefore provided for, or in the improvement of the property of such grandchildren."

Of course, there is no distinction between the cases at all; in both, the proceeds of the primary trust were distributed among the individual beneficiaries and invested for their benefit. As the Court of Appeals for the Fourth Circuit stated in its opinion (68 F. 2d 356 at p. 361):

> " • • • So, in the pending case, we hold that the accumulated income, although intended to be withheld from the grandchildren until the youngest should reach the age of thirty years, was meanwhile held for their individual benefit in two separate trusts apart from the corpus of the main trust."

Until the decision below, this problem was considered settled by the cases which this Court took at the 1935 term, *United States Trust Co.* v. *Commissioner Int. Rev.* (1936), 296 U. S. 481, and *Helvering* v. *McIlvaine* (1936), 296 U. S. 488. Those cases fully disposed of the argument made by the Commissioner up to that time that several trusts could not be established in only a single trust deed, and established that an undivided interest in property may constitute the corpus of a trust (296 U. S. at p. 487). The Court placed emphasis on the proposition that separate accounts were opened for the individual beneficiary, 296 U. S. at pp. 487-488. To be sure, if there is only a single trust with various beneficiaries, with no present distribution or division of a trust or its income until the trust terminates, then there is only a single trust which is taxable as such.[3] Such would have been the situation here in the event the primary trust were left intact and its income merely accumulated for the benefit of several ultimate beneficiaries.

But where, as here, new trusts are set up in the proceeds which are for the separate benefit of named individuals, it is established that each is taxable as a separate entity; and

---

[3] *Urquhart* v. *Commissioner Int. Rev.* (C.C.A. 9th, 1942), 125 F. 2d 701, 28 A.F.T.R. 1133; *Mellon* v. *Commissioner Int. Rev.* (C.C.A. 3rd, 1949), 174 F. 2d 820, 37 A.F.T.R. 1521, aff'g. (1945), 11 T.C. 135; *Marian Neal Trust* (1939), 40 B.T.A. 1033; *Edward M. and Fred E. Hiecke Trust* (1946), 6 T.C. 30; *James S. Reid Trust* (1946), 6 T.C. 438.

the decision below conflicts in principle with the following cases:

Union Trust Co. of Butler v. *Commissioner Int. Rev.* (C.C.A. 3rd, 1936), 84 F. 2d 386, 17 A.F.T.R. 1304;
Houston Land and Tr. Co., Trustee (1935), 33 B.T.A. 73;
Charles S. Davis, Trustee (1938), 37 B.T.A. 587;
Martin F. Tiernan, Trustee (1938), 37 B.T.A. 1048;
Leonard Marx (1939), 39 B.T.A. 537;
St. Louis Union Tr. Co., Trustees (1939), 40 B.T.A. 165;
George G. Allen, Trustee (1939), 40 B.T.A. 351.

With the law apparently settled, the decision below comes only as a discordant note to throw into confusion the possibilities of advising clients and drafting their instruments with some reasonable reliance upon the status of the existing law. Further it encourages the Commissioner of Internal Revenue to disregard established law, including the decisions of this Court, which in 1936 had apparently settled this branch of the law, in the hope that such a process of clogging the courts' dockets and placing a great burden and expense on taxpayers to try their tax cases may produce some further revenue. Small wonder the courts in tax cases are made the object of cynical criticism. See, *e.g.*, Baldinger, "*'With Justice for All' But Taxpayers*", 18 Journ. Bar Assn. Dist. Col. 205 (June, 1951).

And, indeed, the previous decisions accord with principle, and Congress appears to have been well satisfied with the way in which this aspect of the law had been interpreted by the courts. Where one trust exists in which funds are kept, and which can be wielded as an economic unit, it seems reasonable to tax that trust on income received and retained by it just as the tax would be levied in the case of an individual. The law so provides. Here, however, the income is divided to the use of beneficiaries for whom it is retained. It is a discrimination against those beneficiaries as taxpayers to lump all of their sepa-

rate trusts together for the sake of reaching a higher tax bracket. Such disposition might well be disastrous to the individual beneficiaries under the present tax laws with their sharply stepped-up rates of tax. Congress has not directed such a result.

CONCLUSION.

The writ should be granted.

ROBERT ASH,
JOHN W. CRAGUN,
Munsey Building
Washington 4, D. C.
Counsel for Petitioners.

S. BRUCE JONES,
WM. H. WOODWARD,
WALDO G. MILES,
Bristol, Virginia
Of Counsel.

June 18, 1951.

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In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 125

DOMINION NATIONAL BANK OF BRISTOL, VIRGINIA, TRUSTEE, AND PAULINE M. DEFRIECE, TRUSTEE, PETITIONERS

v.

JOE F. HALE, INDIVIDUALLY AND AS FORMER COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF TENNESSEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 27-30) is unreported. The opinion of the Court of Appeals (R. 44-49) is reported at 186 F. 2d 374.

JURISDICTION

The judgments of the Court of Appeals were entered January 18, 1951 (R. 43), and the order denying a petition for rehearing was filed March 20, 1951 (R. 64). The petition for a writ of certiorari was filed June 18, 1951. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether a trust, the income of which was to be divided into four equal parts for the benefit of four beneficiaries, was taxable on the entire income or whether the four parts constituted separate trusts each taxable on its share of the income.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 161. IMPOSITION OF TAX.
>
> (a) *Application of Tax.*—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—
>
> (1) Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests, and income accumulated or held for future distribution under the terms of the will or trust;
>
> (2) Income which is to be distributed currently by the fiduciary to the beneficiaries, and income collected by a guardian of an

infant which is to be held or distributed as the court may direct;

* * * * *

(4) Income which, in the discretion of the fiduciary, may be either distributed to the beneficiaries or accumulated.

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor).

* * * * *

[26 U.S.C. 1946 ed., Sec. 161.]

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(b) [as amended by Sec. 111 (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798][1] There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the

---

[1] Prior to 1942, Section 162 (b) contained slightly different provisions but none of those are material here.

legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

* * * * *

[26 U.S.C. 1946 ed., Sec. 162.]

STATEMENT

These cases involve income tax for the years 1941, 1942 and 1943. The facts were stipulated (R. 17-26) and were adopted in substance by the District Court in its findings of fact (R. 31-36).

The trust agreement involved here was executed on November 26, 1941, by Ina J. Massengill as grantor and petitioners as trustees. (R. 19.) The grantor conveyed an undivided one-half interest in certain chemical formulae owned by the grantor and in use by a corporation under a royalty agreement. The trustees were to own, hold, manage, and lease the formulae for the equal benefit of the grantor's four grandchildren. (R. 31-32.)

The other provisions of the trust agreement

material to the issue here involved are set forth in an appendix to this brief (pp. 12-14). In summary they provide that the income received from the formulae is to be divided into four equal parts for the benefit of four grandchildren, invested for their benefit, and the income from the investments accumulated. When the grandchildren attain 21 years of age, the income from the investments is to be paid to them and, when they reach 30, they will also receive their proportion of the income from the formulae. In 1960 the trust is to terminate and the entire corpus is to be distributed to the grandchildren. Under paragraph 3, if during the continuance of the trust a grandchild dies without leaving issue, his share is to be divided among the others; if all die without issue the entire trust property is to be divided among two named individuals. Under paragraph 4 the trustees are empowered to meet emergencies by paying out for the benefit of any of the beneficiaries up to $5,000 from the "invested corpus" of the trust but not from any part of the formulae themselves.

As to the ages of the beneficiaries, the District Court found that Frank W. DeFriece, Jr., was born on January 29, 1921; Marthina DeFriece in September, 1923; Josephine M. DeFriece on July 13, 1925; and Elizabeth Ann Massengill on June 28, 1930. (R. 34.)

The trustee, Dominion National Bank, received the income from the one-half interest in the for-

mulae during the years 1941, 1942, and 1943. The bank kept separate trust accounts for each of the named beneficiaries. Upon receipt of the income from the formulae, each beneficiary's separate trust account was credited with his or her share. Expenses were also charged to the separate account of each beneficiary. As money accumulated in the respective accounts of each of the beneficiaries, the Dominion National Bank purchased bonds and certificates of indebtedness in the name of the respective beneficiaries. All assets so purchased were recorded and segregated from those purchased on behalf of any of the other beneficiaries. (R. 34-35.)

For the calendar years 1941, 1942, and 1943, the trustees filed fiduciary income tax returns, treating the trust agreement as creating one trust. (R. 35.)

On February 2, 1945, the trustees filed with the Collector of Internal Revenue at Nashville, Tennessee, a separate claim for refund for each of the above calendar years. In these claims they contended that the income from the trust agreement should be taxed as income from four separate trusts, one for each of the beneficiaries named therein. These claims for refund were disallowed in full. (R. 35.)

The District Court concluded as a matter of law that the formulae conveyed under the trust agreement constituted the corpus of one trust; that four other separate and distinct trusts were

created with respect to the income received from the formulae; that the trustees were required to distribute all income upon receipt to these other trusts which were created for the beneficiaries and that such income was the separate property of the beneficiaries. Accordingly, the District Court held that the Collectors erred in treating the trust agreement as creating one trust; that the income from the formulae should be taxed to the separate trusts created for the four beneficiaries; and that judgment should be entered for the trustees. (R. 36.)

The Court of Appeals reversed the decree of the District Court (R. 43) and denied the petition for rehearing (R. 64).

ARGUMENT

Whether, in computing net income under Section 162(b) of the Internal Revenue Code, the petitioners here may, as they contend, deduct trust income accumulated and held by them during the taxable years for the grantor's four grandchildren depends upon whether more than one trust was created by the trust instrument. This in turn depends upon the intention of the grantor. Such intention should be determined from the terms of the trust instrument. *U. S. Trust Co.* v. *Commissioner*, 296 U.S. 481; *McGinley* v. *Commissioner*, 80 F. 2d 692 (C.A. 9); *Langford Inv. Co.* v. *Commissioner*, 77 F. 2d 468 (C.A. 5).

No argument is even suggested that a single trust, with the formulae as the *res,* was not established and does not continue. But, since the income is divided for the benefit of the beneficiaries, it is argued that the trust instrument establishes not one trust but five, the original trust and four subsidiary trusts. Whether or not such an artificial subdivision of an estate should receive judicial recognition if a grantor attempted to establish such a series of trusts, the trust instrument here in question does not make any such attempt. On the contrary, the trust instrument repeatedly refers to the trust in the singular. Thus, in paragraph 1 it uses the language, "at which time the trust will end as hereafter provided" (R. 20); in paragraph 2 it states, "on December 31, 1960, this trust shall automatically terminate" (R. 21; p. 12, *infra*); in paragraph 3 the language, "during the continuance of this trust" is used three times (R. 21; p. 13, *infra*); in paragraph 4 it uses the language, "the invested corpus of the estate" (R. 21; pp. 13-14, *infra*); in paragraph 5 it uses the language, "with the trust estate", "during this trust" and "the situs of the Trust Estate" (R. 22); and in paragraph 6 it uses the phrase "during the life of this trust" (R. 23).

Moreover, the credits which the trustees are authorized to make to each beneficiary by paragraph 2 and on which petitioners entirely rely are

not an absolute division of the trust funds but are subject to the contingencies of survival recited in paragraph 3, and the absence of payments to meet emergencies provided in paragraph 4. The language used by the trust instrument with respect to the funds out of which payments are to be made in the case of emergencies is particularly revealing. The trust instrument refers to such funds as the "invested corpus of the estate" and goes on to provide "and in no event shall any part of the formulae hereby conveyed be disposed of to provide such funds" (pp. 13-14, *infra*). Under petitioners' theory the only corpus of the primary trust would be the formulae themselves and therefore advances for emergencies would have to be made not out of "the invested corpus of the estate" but from the interest of one or another of the particular beneficiaries. Clearly, the grantor intended the trust corpus to consist of both the formulae and the invested royalties with their accretions, all to be held in one trust.

This case is not in conflict with other decisions; on the contrary, both in its reasoning and result it is wholly consistent with the decisions in *Huntington National Bank* v. *Commissioner,* 90 F. 2d 876 (C.A. 6); *Johnson* v. *United States,* 65 C. Cls. 285, certiorari denied, 278 U.S. 611; *McGinley* v. *Commissioner,* 80 F. 2d 692 (C.A. 9); and *Langford Investment Co.* v. *Commissioner,* 77 F. 2d 468

(C.A. 5). Petitioners urge that the decision conflicts with *Lynchburg Trust and Savings Bank* v. *Commissioner,* 68 F. 2d 356 (C.A. 4) certiorari denied, 292 U.S. 640. In that case, one-half of the net income of the trust was payable quarterly to the grantor's daughter and the other half was payable to the two grandchildren, but the trustees were authorized to hold back and invest such portion of either grandchild's share as the trustees might think desirable, and were also specifically authorized to spend such income as they thought advisable on the improvement of the property of the grandchildren. Obviously the trustees in that case were required to and did keep each grandchild's share separate from the original trust corpus and had no power to draw on the share of either for the use of any other beneficiary. Consequently, the division of trust funds there was absolute, and it could be properly held that a separate trust was created for each grandchild.

Carried to its logical conclusion, petitioners' argument would require a finding of separate trusts wherever beneficiaries are granted specific proportional interest in trust income. This was, of course, not the holding in *United States Trust Co.* v. *Commissioner,* 296 U. S. 481, which petitioners claim the court below disregarded. That case merely held that multiple trusts could be set up by a single instrument if that were the intention of the grantor. As demonstrated above, no such

intention appears from the instrument here involved.

CONCLUSION

The decision of the court below is in all respects correct and there is no conflict of decisions. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
ROBERT N. ANDERSON,
LOUISE FOSTER,
Special Assistants to the Attorney General.

JULY, 1951.

APPENDIX

PERTINENT PROVISIONS OF TRUST AGREEMENT, R. 20-22:

2. All income received from the properties shall, upon receipt, be divided into equal parts, one for each of the grandchildren, and placed to the separate credit of each such grandchild. The income so received and credited to each above named grandchild shall be invested and reinvested by the Trustees and all accruals to each share, less necessary and proper charges, shall be held by the Trustees and allowed to accumulate in each grandchild's account until such grandchild shall have attained the age of 21 years. When such age is attained by any above named grandchild, such grandchild shall be entitled to receive, and the Trustees shall pay in quarterly payments, all income from the investments made by funds so coming in and held on behalf of such grandchild and shall continue such payments of income from such investments to such grandchild until he or she reaches the age of 30 years. When such grandchild reaches the age of 30 years he or she shall be entitled to receive and the Trustees shall pay to such grandchild (in addition to the income from investments) such grandchild's proportionate part of the income from the formulae as may come in after such 30th birthday, the Trustees at the same time retaining control and title to the invested corpus of such grandchild and to the formulae. On December 31, 1960 this trust shall automatically terminate and the

Trustees shall pay or transfer and deliver to each of the grandchildren then living all the corpus investments held by them to the credit of each such grandchild and shall also transfer to such grandchild his or her undivided fractional part of all the formulae herein conveyed; provided, however, that if any one of said grandchildren shall so demand in writing the Trustees shall in lieu of such transfer, sell at public auction after 10 days notice for cash, the entire undivided one-half interest in such formulae and distribute the proceeds in cash to all beneficiaries.

3. If during the continuance of this trust any grandchild above named should die without issue surviving, such grandchild's part shall go equally to the other above named grandchildren living at such grandchild's death. If during the continuance of this trust any grandchild above named should die with issue surviving such issue shall be entitled to the same benefits at the same time and to the same extent as such grandchild would have received if he or she had continued to live. In the event of the death of all the above named grandchildren during the continuance of this trust without issue surviving any of them, then upon the death of the last one the entire corpus shall go one-half to Pauline M. DeFriece and one-half to John T. Massengill or their heirs or legatees by representation.

4. The only circumstance under which the Trustees shall have power to pay to any of the beneficiaries any sum out of the invested

corpus of the estate shall be when the Trustees in their sole discretion are of the opinion that an emergency exists which requires the use of such funds for the protection of the health of one of the beneficiaries hereunder, and such beneficiary is unable to provide funds therefor; but such withdrawals from the invested corpus shall in no event exceed $5,000.00, and in no event shall any part of the formulae hereby conveyed be disposed of to provide such funds.

5. The general powers and duties of the Trustees hereunder shall include the investment and reinvestment of each part of the income from the formulae, with accruing interest thereon until the grandchild for whose benefit such share is set aside until such grandchild reaches the age of 21 years and after that date to invest the income from the formulae only in such securities as are permissible under the laws of the states of Virginia or Tennessee for the investment of trust funds, * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 125.

DOMINION NATIONAL BANK OF BRISTOL, VIRGINIA, TRUSTEE, and PAULINE M. DEFRIECE, TRUSTEE, *Petitioners,*

v.

JOE F. HALE, individually and as former Collector of Internal Revenue for the District of Tennessee, ET AL., *Respondents.*

MEMORANDUM IN REPLY TO BRIEF IN OPPOSITION.

Respondent (Brf. Op. p. 9) characterizes petitioners' argument as based on the proposition that there are five trusts involved—an original or primary trust in the formulae themselves, and four subsidiary trusts for the grandchildren individually. Then by inference from paragraph 4 of the trust indenture (R. 21-22), respondent argues that the provision for advances to the grandchildren from corpus for emergencies would have to come from the subsidiary trust of one or another of the particular beneficiaries, since that paragraph also provides that the original or primary trust shall not be invaded. Upon this inference the further inference is built that the grantor must have intended only one trust, the corpus to consist of both the

formulae and the invested royalties, with their accretions.

Paragraph 4 of the trust agreement is subject to no such fine-spun logic. While we must respect respondents' ingenious treatment of what are perfectly plain provisions, we point out that the only inference possible from the fact that advances may be made in an emergency from invested corpus, but that "in no event shall any part of the formulae hereby conveyed be disposed of to provide such funds" is that the corpus of the estate invested in the separate funds (that is, separate trusts) for each of the grandchildren pursuant to Paragraph 2 of the trust agreement is to be considered entirely distinct from the single trust established in the formulae themselves.

We wish also to point out that the essential identity of facts and the square conflict of law between the decision below and that in *Lynchburg Tr. & Savgs. Bank* v. *Commissioner*, 68 F. 2d 356, cert. den. 292 U. S. 640, is in no respect disparaged by the only basis for asserted distinction which respondent makes (Brief Op., p. 10)—"Obviously the trustees in that case were required to and did keep each grandchild's share separate from the original trust corpus and had no power to draw on the share of either for the use of any other beneficiary." Just so here: In this case the individual shares had to be held separate, apart and distinct from each other and from the corpus of the original trust from which the corpus of each subsidiary trust was derived as income was paid from year to year. See Paragraph 2 of the trust indenture (R. 20).

Respectfully submitted,

ROBERT ASH,
JOHN W. CRAGUN,
Counsel for Petitioners.

S. BRUCE JONES,
WM. H. WOODWARD,
WALDO G. MILES,
Of Counsel.